

The Honorable Ronald B. Leighton

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

PUGET SOUNDKEEPER ALLIANCE
et al.,

Plaintiffs,

and

STATE OF WASHINGTON,

Plaintiff-Intervenor

v.

UNITED STATES DEPARTMENT OF
THE NAVY et al.,

Defendants.

NO. 3:17-cv-05458-RBL

CONSENT DECREE

WHEREAS, this Consent Decree is made between Plaintiffs Puget Soundkeeper Alliance, Washington Environmental Council, and the Suquamish Tribe (collectively, “Plaintiffs”), Intervenor the State of Washington, and Defendants, Mark Esper, Secretary of Defense; Thomas B. Modly, Acting Secretary of the Navy; Richard G. Rhinehart, Commanding Officer of Naval Base Kitsap; and the United States Navy (collectively,

1 “Defendants” or the “Navy”). Plaintiffs, the State of Washington, and the Navy are
2 collectively referred to as the “Parties”;

3 WHEREAS, in this lawsuit, Plaintiffs and the State of Washington allege, among other
4 things, that the Navy violated the Clean Water Act by discharging pollutants without a Clean
5 Water Act section 402 permit, 33 U.S.C. § 1342, when the Navy conducted underwater hull
6 cleaning of the inactive ship, ex-INDEPENDENCE, in Sinclair Inlet of Puget Sound;
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8 WHEREAS, the Navy conducted the referenced hull cleaning of ex-INDEPENDENCE
9 in accordance with the consultation with the National Marine Fisheries Service pursuant to the
10 Endangered Species Act for the towing of ex-INDEPENDENCE, in order to minimize the risk
11 of invasive species transfer resulting from the towing of ex-INDEPENDENCE for dismantling
12 to a location in Texas in 2017;
13

14 WHEREAS, Plaintiffs and the State of Washington contend that the alleged
15 unauthorized discharges are ongoing, that the Navy may in the future conduct additional
16 underwater hull cleaning of other inactive Navy ships in Puget Sound prior to towing, and that
17 the discharges from ex-INDEPENDENCE may have caused, and may continue to cause,
18 significant adverse effects to the waters and wildlife in Sinclair Inlet;
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20 WHEREAS, the Navy contends that the challenged underwater hull cleaning meets the
21 requirements of the Clean Water Act under the Uniform National Discharge Standards and a
22 discharge permit is not required because the National Pollutant Discharge Elimination System
23 permitting requirement does not apply to underwater hull cleaning by the Navy, and that no
24 significant environmental harm has been, or is currently being, caused by the referenced
25 underwater hull cleaning;
26

1 WHEREAS, six inactive ships (including one aircraft carrier) currently located in the
2 Puget Sound (ex-KITTY HAWK (CV 63); ex-RODNEY M. DAVIS (FFG 60); ex-
3 INGRAHAM (FFG 61); ex-DUBUQUE (LPD 8); ex-BRIDGE (TAOE 10); and ex-RAINIER
4 (TAOE 7)) may in the future require underwater hull cleaning in Puget Sound prior to being
5 towed to another location to minimize the risk of invasive species transfer via the hull and
6 thereby to comply with the March 4, 2019 Programmatic Biological and Conference Opinion
7 on the Towing of Inactive U.S. Navy Ships from their Existing Berths to Dismantling Facilities
8 or other Inactive Ship Sites;

10 WHEREAS, in accordance with applicable regulations, if hull cleaning is required, dry-
11 docking is the preferred hull cleaning method for all inactive ships located in Sinclair Inlet
12 prior to their relocation for dismantling; and

14 WHEREAS, the Parties intend to resolve this lawsuit without the adjudication or
15 admission of any issue of fact or law, in a manner that addresses the environmental concerns
16 raised by Plaintiffs and the State of Washington and accommodates the Navy's operational
17 needs.

18 NOW THEREFORE, it is hereby ordered, adjudged, and decreed as follows:

19 1) For the ten-year period beginning on the effective date of this Consent Decree,
20 the Navy shall neither conduct underwater hull cleaning in Puget Sound on the six inactive
21 ships referenced above, nor any inactive aircraft carrier brought to Puget Sound during that
22 ten-year period.

24 2) This ten-year moratorium on underwater hull cleaning, set forth in Paragraph 1
25 above, shall not apply to underwater cleaning of limited portions of the hull of any inactive
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1 ship referenced in Paragraph 1 to prepare that ship to be dry-docked at a location in Puget
2 Sound, provided that this cleaning is the minimum necessary to dock and safely seat that ship
3 on blocks during such dry-docking. This ten-year moratorium shall also not apply to routine
4 hull integrity testing, provided the cleaning is the minimum necessary to conduct such
5 operations. The Navy agrees to continue to use best management practices for the cleaning of
6 limited portions of the hull of the inactive ships referenced in Paragraph 1 for dry-docking,
7 including trimming of biological growth to approximately one inch of the hull to dock and
8 safely seat the ship on blocks during dry-docking.
9

10 3) If, within the three-year period after the expiration of the ten-year period
11 identified in Paragraph 1, the Navy intends to conduct underwater hull cleaning of ex-KITTY
12 HAWK, or of any other inactive aircraft carrier brought to Puget Sound during the ten-year
13 period identified in Paragraph 1, the Navy shall provide Plaintiffs and the State of Washington
14 with 180 days advance notification before initiating such underwater hull cleaning. This notice
15 requirement shall not apply to underwater cleaning of limited portions of the hull of such
16 inactive aircraft carriers to prepare that inactive aircraft carrier to be dry-docked at a location in
17 Puget Sound, provided that this cleaning is the minimum necessary to dock and safely seat that
18 ship on blocks during such dry-docking, or to conduct routine hull integrity testing in Puget
19 Sound for any inactive aircraft carrier subject to such testing, provided that this cleaning is the
20 minimum necessary to conduct such operations.
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23 4) The Navy shall provide Plaintiffs and the State of Washington, either at in-
24 person meetings or through telephonic means, as the Parties may agree, with three status
25 updates on underwater hull cleaning technology advancements, to occur on dates agreed to by
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1 the Parties that are approximately three years, six years, and nine years after the effective date
2 of this Consent Decree.

3 5) On the floor of Sinclair Inlet, at the location specified in Attachment A, portions
4 of which underlie the location where the Navy conducted underwater hull cleaning of ex-
5 INDEPENDENCE, the Navy shall no later than the end of calendar year 2022 complete the
6 construction of a thin layer placement of clean sand, no less than 10 cm thick, in accordance
7 with the requirements in Attachment A. The Navy shall provide Plaintiffs and the State of
8 Washington with written certification that this work has successfully satisfied the requirements
9 in Attachment A and copies of as-built engineering drawings of the thin layer placement,
10 within 30 days of that written certification of satisfaction.
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12 6) Plaintiffs and the State of Washington reserve the right to seek an award of
13 reasonable attorneys' fees and costs under the Clean Water Act fee-shifting provisions, and the
14 Navy reserves the right to contest any such fees and costs claimed by Plaintiffs and the State of
15 Washington. In the event that such claims for fees and costs cannot be resolved through a
16 separate settlement within 120 days after the effective date of this Consent Decree, Plaintiffs
17 and the State of Washington may file a motion for such fees and costs no later than 150 days of
18 the effective date of this Consent Decree.
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20 7) No provision of this Consent Decree shall be interpreted as or constitute a
21 commitment or requirement that the United States or the Navy obligate or pay funds in
22 contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341.
23

24 8) The Parties recognize that the Navy may be required to obtain a permit under
25 Section 404 of the Clean Water Act to construct the thin layer placement required by
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1 Paragraph 5. This Consent Decree is not, and shall not be construed to be, a permit issued
2 pursuant to any law for construction of the thin layer placement. Provided that the Navy has
3 pursued with reasonable diligence any such required permit, or any other necessary approvals
4 by other State or Federal agencies, any delay in securing necessary permits or approvals that
5 prevents the Navy from timely satisfying the requirements of this Consent Decree shall not
6 constitute a failure to comply with the terms of this Consent Decree. Plaintiffs represent that
7 they shall not oppose or object to the issuance of any such necessary permit or other approval
8 issued by any agency, and the State of Washington represents that it shall not oppose or object
9 to the issuance of any such necessary permit or approval by any agency other than an agency
10 of the State of Washington, so long as such permit application and/or federal approval
11 complies with the terms of this Consent Decree and Attachment A. By this stipulation not to
12 oppose or object, Plaintiffs, in any agency proceeding, and the State of Washington, in any
13 proceeding by an agency that is not part of the State of Washington, shall not seek to impose
14 any requirements or mitigation beyond the requirements identified in Attachment A to this
15 Consent Decree. The Parties recognize that the Navy may be required to obtain a water quality
16 certification from the State of Washington under Section 401 of the Clean Water Act to
17 construct the thin layer placement required by Paragraph 5. The State of Washington shall
18 make best efforts to facilitate the timely issuance of any permits or other approvals necessary
19 to construct the thin layer placement.
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23 9) The Parties recognize that the possibility exists that circumstances outside the
24 reasonable control of the Navy could delay compliance with the requirements in this
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1 Consent Decree. Should a delay occur due to circumstances outside the reasonable control of
2 the Navy, to the extent practicable, the Navy will provide Plaintiffs and the State of
3 Washington 30-days advance written notice of the basis for the circumstances and estimated
4 delay, notice of the steps that will be taken to accomplish the obligation, and notice of the
5 projected time that will be required to resolve the delay. Any resulting failure to meet the
6 requirements set forth in this Consent Decree that is beyond the reasonable control of the Navy
7 and that is agreed to by Plaintiffs in writing shall not constitute a failure to comply with the
8 terms of this Consent Decree. Notwithstanding whether advance notice has been provided by
9 the Navy, if the Parties dispute whether the failure to comply with the requirements in this
10 Consent Decree were due to circumstances outside the reasonable control of the Navy, they
11 will submit the matter to the Court for resolution.
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14 10) Before Plaintiffs or the State of Washington may file a motion in court to
15 enforce any requirement of this Consent Decree, that party shall provide the Navy with no less
16 than 30 days advance written notice of the basis for any alleged non-compliance and an
17 opportunity to meet to discuss this matter, unless filing such a motion to enforce is necessary to
18 prevent imminent and substantial harm.

19
20 11) The Parties may jointly request the Court to modify this Consent Decree.
21 Before one or more of the Parties files a motion to modify this Consent Decree, they shall meet
22 with all the Parties in an effort to resolve the matter or otherwise reach agreement on any
23 required modification no less than 30 days before filing such a motion.

24 12) This Consent Decree is the product of negotiation by the Parties. All Parties
25 contributed to its drafting. In any dispute over the meaning of any provision of this Consent
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1 Decree, the Parties shall be treated as having contributed equally to the drafting of that
2 provision.

3 13) This Consent Decree represents the full and final resolution of any and all
4 claims, known or unknown, that have been, could have been, could now be, or could hereafter
5 be asserted by Plaintiffs or the State of Washington against the Navy in connection with
6 underwater hull cleaning of ex-INDEPENDENCE, or in connection with underwater hull
7 cleaning of any inactive ship referenced in Paragraph 1 conducted during the ten-year period
8 referenced in Paragraph 1, by the Navy in Puget Sound, including, but not limited to, any
9 claims that the Navy has violated, is violating or hereafter will violate the requirements of the
10 Clean Water Act, the Resource Conservation and Recovery Act, and any other federal, state, or
11 local laws Plaintiffs and the State of Washington hereby covenant not to bring any judicial or
12 administrative enforcement action under any federal, state, or local law or regulation against
13 the Navy, its officials or employees, or its contractors or their subcontractors, their officials, or
14 employees, in connection with underwater hull cleaning of ex-INDEPENDENCE and of any
15 inactive ship referenced in Paragraph 1 above for which underwater hull cleaning is conducted
16 during the ten-year period referenced in Paragraph 1.
17

18
19 14) The Parties agree that this Consent Decree is fair, reasonable, and in the public
20 interest. This Consent Decree was negotiated and executed in good faith and at arm's length
21 and is a fair and equitable compromise of disputed claims. This Consent Decree is not and
22 shall not constitute or be construed as an admission by the Navy of any factual allegations
23 made by Plaintiffs or the State of Washington in this action, an admission of liability, or an
24 admission of any other kind or character whatsoever by the Navy. Neither this Consent Decree
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1 nor the Parties' performance under this Consent Decree is intended to have, and shall not be
 2 deemed to have, any evidentiary or precedential effect in any other judicial or administrative
 3 action involving claims asserted against the Navy.

4 15) This Consent Decree shall be governed by and construed under federal law.

5 16) This Consent Decree constitutes the entire agreement between the Parties with
 6 respect to the matters covered herein. All prior discussions, drafts, and writings are superseded
 7 by this Consent Decree and may not be used to vary or contest the terms of the Consent
 8 Decree.
 9

10 17) The individuals signing this Consent Decree on behalf of the Parties hereby
 11 certify that they are authorized to bind their respective party to this Consent Decree. This
 12 Consent Decree may be executed by multiple signature pages.
 13

14 18) This Consent Decree shall be effective upon the date of its entry by the Court.

15 19) The Consent Decree requirements relevant to the following events shall
 16 terminate (a) for the work to be performed under Paragraph 5, when all work and subsequent
 17 notice to Plaintiffs under Paragraph 5 has been completed, (b) for the ten-year period
 18 referenced in Paragraph 1, when the ten-year period referenced in Paragraph 1 has expired, (c)
 19 for the status updates to be provided under Paragraph 4, when all three status updates on
 20 underwater hull cleaning technology advancements have been completed, and (d) for the notice
 21 required under Paragraph 3, when notice of intent to conduct in-water hull cleaning of ex-
 22 KITTY HAWK (and any other inactive aircraft carrier brought to Puget Sound during the ten-
 23 year period identified in Paragraph 1) has been provided, or ex-KITTY HAWK (and any other
 24 inactive aircraft carriers brought to Puget Sound during the ten-year period identified in
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Paragraph 1) are no longer located in Puget Sound, or the three-year period in Paragraph 3 has expired. When the conditions in (a) through (d) have occurred, the entire Consent Decree shall terminate.

20) All certifications, deliverables, modifications, notices, notifications and requests specified in this Consent Decree must be in writing unless otherwise specified. Whenever, under this Decree, notice is required to be given, or a document is required to be sent, by one Party to another, it must be directed to the person(s) specified below at the address(es) specified below. Any Party may change the person and/or address applicable by providing notice of such change to all Parties. All notices under this Section are effective upon receipt, unless otherwise specified. Except as otherwise provided, written notice to a Party by regular mail in accordance with this Section satisfies any notice requirement of the Decree regarding such Party.

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9 21) This Court retains jurisdiction over this Consent Decree until it is terminated
10 pursuant to paragraph 19.

11 22) This Consent Decree and its Attachment A constitute the final, complete, and
12 exclusive agreement and understanding among the Parties regarding settlement embodied in
13 this Decree. The Parties acknowledge that there are no representations, agreements, or
14 understandings relating to the settlement other than those expressly contained in this Decree.
15 Upon entry of this Consent Decree by the Court, this Decree shall constitute a final judgment
16 between and among the Parties. The Court finds that there is no just reason for delay and
17 therefore, enters this judgment as a final judgment under Fed. R. Civ. P 54 and 58.

18
19 IT IS SO ORDERED, this _____ day of _____ 2020.

20
21 _____
22 United States District Court Judge
23
24
25
26

1 Signature Page for Consent Decree

2 **FOR DEFENDANTS:**

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4 Assistant Attorney General
5 Environment & Natural Resources Division

6 Brian T. Moran
7 United States Attorney

8 /s/ David J. Kaplan Dated: 01/29/2020

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20 **FOR PLAINTIFFS PUGET SOUNDKEEPER ALLIANCE and**
21 **WASHINGTON ENVIRONMENTAL COUNCIL**

22 /s/ Richard Smith Dated: 01/29/2020

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FOR PLAINTIFF THE SUQUAMISH TRIBE

/s/ Melody Allen Dated: 01/29/2020

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Dated: 01/29/2020

Attachment A: Thin Layer Placement

Thin Layer Placement Overview:

Six to nine inches of clean sand will be placed directly under the ex-INDEPENDENCE in-water footprint plus a buffer. There will be some mixing of sediment and the sand during placement due to the presence of soft sediment. Placement will result in a vertical profile of existing sediment, overlain with a mixture of existing sediment and sand, and the surface will be clean sand. The intent of this placement is to provide a clean layer of material in the biologically active zone (generally considered to be the top 10 cm in Puget Sound).

Physical Extent of Thin Layer Placement:

The attached figure depicts the geographic extent of the thin layer placement, which includes the buffer covers 8.03 acres. As depicted on the attached figure, the placement will extend to:

- the toe of the riprap on the north end;
- the western edge of Mooring G on the northeast side;
- the projection of the flight deck of ex-KITTY HAWK onto the sediment surface on the southeast side;
- the edge of the enhanced natural recovery area on the west side; and
- 100 feet south from the projection of the flight deck of ex-INDEPENDENCE onto the sediment surface on the south side.

Suitability of Material:

The gradation and physical properties of the proposed clean sand material for the thin layer placement will conform with WSDOT Standard Specification 9-03.1(2) B for “Class 2 Fine Aggregate.” Material will be natural sand and will be sourced from an approved supplier listed in the most current WSDOT Aggregate Source Approval Report (<https://www.wsdot.wa.gov/Business/MaterialsLab/ASA.htm>).

SAND MATERIAL	
U.S. Standard Sieve Size	Percent Passing by Dry Weight
3/8"	99-100
U.S. No. 4	95-100

U.S. No. 16	45-80
U.S. No. 50	10-30
U.S. No. 100	2-10
U.S. No. 200	0-2

Verification of Placement Extent and Thickness:

To ensure thickness of the thin layer placement upon installation, the Navy will use a combination of appropriate verification methods, such as multibeam hydrographic surveys, sub-bottom profiling, diver hand cores and/or placement of grade stakes and post-placement diver surveys to ensure that there is a minimum of 10 cm of clean sand overlying existing sediment surface within the footprint of the thin layer placement. If verification results indicate areas that do not meet the minimum thickness criteria, the Navy will require the placement of additional material and will not release the contractor of its obligations until verification of the required thickness and extent of the thin layer placement.

Best Management Practices (BMPs):

Environmental BMPs:

- All mechanized equipment shall be maintained in proper operating condition, with equipment inspections occurring at the start of each workday. Equipment found to be leaking hydraulic fluid or any type of petroleum product shall be removed from the site for maintenance or repair.
- Material barge(s) will be inspected by the Navy Representative upon delivery to the project site to determine whether there are significant leaks that could contribute to the exceedance of the turbidity criteria as determined by the Navy Representative. Contractor shall promptly repair any such leaks as identified by the Navy Representative.
- Drip pads or pans shall be placed under mechanized equipment to contain any potential leaks of petroleum products or hydraulic fluids.
- To the extent possible, hydraulic fluids in equipment shall be replaced with vegetable-based fluids.
- A spill kit shall be kept on each work vessels to contain any potential petroleum or hydraulic fluid spills that might occur.

- No project-related debris or wastes shall be allowed to enter the water. The Contractor shall recover and remove any debris or waste that accidentally enters the water.
- Barges and work vessels shall not be aground on the substrate. Work barges will be held on station with spuds or anchors.

Thin Layer Placement BMPs:

- A one-half acre test plot is required validate placement methods prior to placement on the remaining acreage. The test plot shall be verified by methods listed above.
- The target placement thickness is 9" in at least two offset lifts.
- Placement equipment shall not contact the sediment bed at any time during placement.
- Thin layer placement material shall not be released from above the water surface.
- Contractor equipment shall not disturb thin layer placement plots in any way after material has been placed.

Verification BMPs:

- Thin layer placement thickness and extent shall be verified using multibeam hydrographic surveying, sub-bottom profiling, sediment profile imaging, and/or diver surveys.
- Hydrographic surveying shall be performed in accordance with NAVFAC NW Standard Operating Procedure for Multibeam Hydrographic Surveying at NBK Bremerton, current version.
- Sub-bottom profiling, if used, shall be performed in accordance with NAVFAC NW Standard Operating Procedure for Sub-Bottom Profiling at NBK Bremerton, current version.
- Material placed within each plot shall be weight equivalent to a 9-inch nominal layer for the area based on scale tickets and/or barge draft during placement.
- The thickness of placed material shall be 4 inches or greater in all locations.
- For any areas of thin placement (less than 4 inches) noted during the verification process, the Navy Representative will direct Contractor to place additional material as necessary. Additional placement areas shall be re-verified.
- The Contractor shall provide as-built drawings in electronic format in both AutoCAD, Release 2010 or newer, and in PDF format.

